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13 Board As Liquidating Agent For Western Corporate Federal Credit Union

14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16 WESTERN DIVISION

17 NATIONAL CREDIT UNION
18 ADMINISTRATION BOARD AS
19 LIQUIDATING AGENT FOR
20 WESTERN CORPORATE FEDERAL
21 CREDIT UNION,

22 Plaintiff,

23 v.

24 ROBERT A. SIRAVO, TODD M. LANE,
25 ROBERT J. BURRELL, THOMAS E.
26 SWEDBERG, TIMOTHY T. SIDLEY,
27 ROBERT H. HARVEY, JR., WILLIAM
28 CHENEY, GORDON DAMES, JAMES
P. JORDAN, TIMOTHY KRAMER,
ROBIN J. LENTZ, JOHN M. MERLO,
WARREN NAKAMURA, BRIAN
OSBERG, DAVID RHAMY and
SHARON UPDIKE,

Defendants.

Case No.: CV10-01597 GW (MANx)

**REPLY MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION OF
PLAINTIFF AND
COUNTERDEFENDANT
NATIONAL CREDIT UNION
ADMINISTRATION BOARD AS
LIQUIDATING AGENT FOR
WESTERN CORPORATE
FEDERAL CREDIT UNION TO
STRIKE AFFIRMATIVE
DEFENSES**

Date: January 9, 2012
Time: 8:30 a.m.
Courtroom: 10

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INTRODUCTION

Plaintiff and counterdefendant the National Credit Union Administration Board as Liquidating Agent for Western Corporate Federal Credit Union (the “NCUA”) brought this motion to strike largely to remove affirmative defenses based on the pre-failure actions of the NCUA as regulator – affirmative defenses that have repeatedly been held legally insufficient.

Defendants and counterclaimants Robert A. Siravo, Thomas E. Swedberg, Timothy T. Sidley (“Sidley”), Robert J. Burrell, and Todd M. Lane (collectively, the “Officer Defendants”) concede that the case law establishes that the NCUA “cannot be blamed for any failings vis-à-vis WesCorp.” Docket 203 at 13:10-12. They cite no authority suggesting that the affirmative defenses are valid. However, they argue that those defenses should not be stricken because evidence of what the NCUA did might be relevant to whether the Officer Defendants acted improperly.

In so doing, the Officer Defendants confuse the legal sufficiency of the defenses at issue with the scope of discovery on the NCUA’s claims. To the extent that the conduct of the NCUA is material to the issues that the NCUA must prove to prevail on its claims – the appropriate standard of care and whether the Officer Defendants met it – then it would be a proper subject of discovery. However, this motion is not the proper procedural mechanism to decide that question, and the NCUA is not asking the Court to do so here. The question is irrelevant to the legal sufficiency of the affirmative defenses at issue. Because the NCUA’s pre-failure conduct does not give rise to legally sufficient affirmative defense, the Court should strike all affirmative defenses that are based on conduct by the NCUA prior to WesCorp’s failure.¹

¹ The Officer Defendants also contend that the NCUA stipulated away its right to challenge affirmative defenses that they could have asserted against WesCorp. However, the stipulation relied upon by the Officer Defendants merely substituted the NCUA as liquidating agent for the NCUA as conservator, while providing that such substitution did *not* affect the parties’ substantive rights against each other. See Docket 125 at 3:7-12.

1 Next, although the Court has already held that the Officer Defendants cannot
2 rely on the business judgment rule, *see* Docket 110 at 9-11, they argue that they
3 should be able to assert the business judgment rule as an affirmative defense
4 because the Court may have made a mistake in its ruling. The Officer Defendants
5 have shown no basis for reconsideration. To the contrary, Judge Wright recently
6 issued a detailed opinion that concluded, like this Court, that as a matter of
7 California law the business judgment rule does not apply to officers. *See FDIC v.*
8 *Perry*, 2011 U.S. Dist. LEXIS 143222 at *8-14 (C.D. Cal. Dec. 13, 2011).

9 Furthermore, the Officer Defendants argue that the Court should not strike
10 their bald assertion of their statute of limitations defenses because the alleged lack
11 of clarity of the NCUA's Second Amended Complaint prevents them from
12 identifying the applicable statute of limitations. Nothing in the Second Amended
13 Complaint excuses the Officer Defendants' obligation to comply with Fed. R. Civ.
14 P. 8 and to properly identify in their defenses "which claims are untimely and which
15 statutes of limitations are at issue." *Gessele v. Jack in the Box, Inc.*, 2011 U.S. Dist.
16 LEXIS 99419 at *15 (D. Or. Sept. 2, 2011) (striking statute of limitation affirmative
17 defense). Because there is no dispute that the Officer Defendants' statute of
18 limitations defenses consist of nothing more than a legal conclusion, the Court
19 should strike them.

20 Finally, while Sidley attempts to argue that his estoppel defense is legally
21 sufficient, the defense is improper both because it relies upon the NCUA's pre-
22 failure conduct and because it fails to allege the type of egregious facts necessary to
23 support the assertion of the affirmative defense of estoppel against the government.
24 The Court should therefore strike Sidley's affirmative defense of estoppel.

LEGAL ARGUMENT

I. AFFIRMATIVE DEFENSES BASED ON THE NCUA’S PRE-FAILURE CONDUCT ARE LEGALLY INSUFFICIENT.

The Officer Defendants concede – as they must – that the NCUA’s pre-failure conduct was not “a supervening or intervening cause of damage to WesCorp,” and they acknowledge that the NCUA “cannot be blamed for any failings vis-à-vis WesCorp.” Docket 203 at 13:4-5, 13:10-12. While they cite no authority suggesting that their affirmative defenses based on pre-failure regulatory conduct are legally viable, the Officer Defendants argue that the NCUA’s motion to strike should be denied because: (1) the NCUA has purportedly stipulated to the defenses; (2) evidence regarding the NCUA’s conduct may otherwise be relevant to issues presented in the case; (3) the NCUA was involved in the same decisions it now criticizes; and (4) the cases cited by the NCUA are distinguishable. *See id.* at 5:20 – 15:3. None of these arguments justifies retaining the legally insufficient defenses.

A. The NCUA did Not Stipulate to Affirmative Defenses Based on the NCUA’s Pre-Failure Conduct.

The Officer Defendants’ lead argument is that the NCUA agreed in the Joint Stipulation to Substitute NCUA as Liquidating Agent in Place of NCUA as Conservator [Docket 125] that they could assert defenses based on the NCUA’s pre-failure conduct, and that the NCUA therefore cannot now seek to strike these defenses. *See* Docket 203 at 5:20 – 6:17. This argument blatantly misreads the stipulation. The portion of the stipulation quoted by the Officer Defendants is explicitly limited to “affirmative defenses *arising out of WesCorp’s conduct – or the NCUA’s conduct as Conservator and/or Liquidator.*” Docket 125 at 2:21-26 (emphasis added) (the NCUA “is the proper party against which Defendants’ claims, counterclaims, cross-claims and affirmative defenses arising out of the act or omissions of WesCorp and the NCUA as Conservator and/or Liquidator are to be

1 asserted in this action”). It says nothing about affirmative defenses based on pre-
2 failure conduct of the NCUA as regulator.

3 Moreover, the parties specifically agreed (in a portion of the stipulation not
4 cited by the Officer Defendants) that the stipulation did *not* affect the parties’
5 substantive claims and defenses against each other:

6 *This stipulation, and the substitution of the NCUA as*
7 *Liquidating Agent, do not affect in any way whatever rights, if any,*
8 *Defendants may have to assert claims, counterclaims, cross-claims or*
9 *affirmative defenses . . . against WesCorp or against the NCUA as*
10 *Conservator and/or Liquidating Agent (the NCUA by this stipulation*
11 *does not concede that defendants have any such rights).*

12 *Id.* at 3:7:12 (emphasis added).

13 The Officer Defendants also argue that “it is settled law that the NCUA stands
14 in the shoes of WesCorp with respect to such defenses” and that “any defense
15 Defendants have as [to] WesCorp itself, such as defenses of consent, approval,
16 acquiescence, participation, and ratification by WesCorp’s board, is likewise viable
17 against the NCUA, which seeks to bring the claims on WesCorp’s behalf.” Docket
18 203 at 6:10-17. The NCUA does not dispute this proposition, which applies to the
19 NCUA as liquidating agent, and it therefore is not seeking to strike the Officer
20 Defendants’ affirmative defenses to the extent they are based on the conduct of
21 WesCorp or its board.

22 **B. The Officer Defendants’ Focus on Discovery and Evidentiary**
23 **Issues is Misplaced.**

24 Throughout their opposition, the Officer Defendants essentially argue that the
25 affirmative defenses based on pre-failure regulatory conduct should not be stricken
26 so that the Officer Defendants are not hampered in their ability to obtain discovery
27 relevant to the standard of care and whether they breached it – issues material to
28 NCUA’s proof of its claims. *See, e.g.,* Docket 203 at 1:19 – 2:13, 6:18 – 7:24, 14:1
– 15:3. For example, the Officer Defendants argue that if the motion to strike is
granted, they will not be able to “introduce evidence of the NCUA’s involvement

1 with WesCorp,” which is critical to their defense because WesCorp allegedly
2 instructed them to follow the NCUA’s directions. *Id.* at 14:26 – 15:3.

3 The short answer is that the scope of discovery for the Officer Defendants’
4 defenses to NCUA’s case in chief is independent of the legal sufficiency of the
5 affirmative defenses at issue here. Whether any particular evidence is discoverable,
6 admissible, or relevant depends on its relationship to the issues that are material to
7 the NCUA’s claims. It does not depend on whether the affirmative defenses at issue
8 are legally sufficient, redundant, immaterial, or impertinent. *See* Fed. R. Civ. P.
9 12(f); *Desert European Motorcars, Ltd. v. Desert European Motorcars, Inc.*, 2011
10 U.S. Dist. LEXIS 96154 at *7-8 (C.D. Cal. Aug. 25, 2011). Thus, although
11 damages are relevant in virtually every case, affirmative defenses alleging that
12 plaintiffs are not entitled to recover damages are routinely stricken because alleging
13 that the plaintiff is not entitled to recover damages is not a legally sufficient
14 affirmative defense. *See, e.g., id.* at *4; *J&J Sports Prods. v. Soto*, 2010 U.S. Dist.
15 LEXIS 103958 at *4-5 (S.D. Cal. Sept. 27, 2010).

16 The same is true here. Regardless of defendants’ arguments regarding the
17 scope of discovery and the relevance of certain evidence, “[c]ourts have uniformly
18 held that claims or defenses based upon pre-receivership actions of regulators are
19 legally insufficient,” *Grant Thornton, LLP v. FDIC*, 535 F. Supp. 2d 676, 722 (S.D.
20 W. Va. 2007). The affirmative defenses based on the NCUA’s alleged pre-failure
21 conduct should therefore be stricken.

22 The Officer Defendants argue that granting the NCUA’s motion would “pre-
23 judge the duty of care issue, or foreclose an important body of evidence directly
24 relevant to the standard of care.” Docket 203 at 7:20-22. That is simply not the
25 case. To the extent that alleged actions or omissions of the NCUA are relevant to
26 the Officer Defendants’ standard of care or whether they met it, those actions or
27 omissions would be subject to discovery, regardless of whether the affirmative
28 defenses are stricken. However, questions regarding the discoverability of evidence

1 should be addressed during the discovery process. Questions regarding the
2 admissibility of evidence should be addressed – as the Officer Defendants suggest –
3 at the time “when [the] evidence is presented.” Docket 203 at 7:23-24.

4 The Officer Defendants expound at length on their allegations of NCUA
5 involvement in WesCorp. *See id.* at 8:1 – 11:8. These allegations (many of which
6 the NCUA disputes) do not render the affirmative defenses legally sufficient. As the
7 Officer Defendants acknowledge in their discussion of cases and otherwise, the
8 allegations are relevant – if at all – to the issues of the Officer Defendants’ standard
9 of care and whether they met it, issues that are part of the NCUA’s claims regardless
10 of any affirmative defense.

11 C. **The Rule Precluding Defenses Based upon the Pre-Failure Conduct**
12 **of Banking Regulators is Not Contingent Upon the Extent of the**
13 **Regulators’ Oversight.**

14 In its opening memorandum, the NCUA cited numerous cases that held that
15 the pre-failure actions of financial institution regulators cannot be asserted as an
16 affirmative defense to claims brought by the receiver or liquidator of those
17 institutions. *See* Docket 195-1 at 6:22 – 7:8. Although the Officer Defendants
18 concede that the NCUA “cannot be blamed for any failings vis-à-vis WesCorp,” *see*
19 Docket 203 at 13:10-12, they argue that this case can be distinguished from the
20 cases cited by the NCUA because “the NCUA approved of the investments it now
21 says were recklessly made,” *see id.* at 13:19-24. The Officer Defendants’ attempt to
22 distinguish the cases cited by the NCUA on their facts, *see id.* at 11:10 – 13:26, fails
23 because those cases state a bright-line rule that is not contingent upon the extent of
24 the regulators’ oversight.

25 The Officer Defendants do not cite *any* authority (and the NCUA is aware of
26 none) that creates an exception to the general rule when a regulatory agency is
27 *especially* involved in the oversight of the failed institution, or when the agency
28 “approves” the conduct of that institution. To the contrary, courts in a variety of
settings and circumstances have all reached the same conclusion: the pre-failure

1 conduct of a regulatory agency cannot support a legally viable defense, regardless of
2 the level of oversight exercised by the regulatory agency. *See, e.g., FDIC v.*
3 *Ornstein*, 73 F. Supp. 2d 277, 281 (E.D.N.Y. 1999) (striking affirmative defenses
4 based on pre-receivership conduct); *RTC v. Sands*, 863 F. Supp. 365, 372-73 (N.D.
5 Tex. 1994) (pre-conservatorship conduct of banking regulators is off limits); *FDIC*
6 *v. Lowe*, 809 F. Supp. 856, 858 (D. Utah 1992) (affirmative defenses against the
7 FDIC in its capacity as regulator are insufficient as a matter of law); *FDIC v.*
8 *Crosby*, 774 F. Supp. 584, 586 (W.D. Wash. 1991) (regulatory conduct prior to
9 receivership not relevant); *FDIC v. Ashley*, 749 F. Supp. 1065, 1068 (D. Kan. 1990)
10 (contributory negligence defense not available against FDIC for pre-closing
11 activities); *FDIC v. Carter*, 701 F. Supp. 730, 737 (C.D. Cal. 1987) (the
12 discretionary function exemption requires the court to strike affirmative defenses
13 based on the FDIC's oversight of a bank).²

14 If the NCUA's "approval" of investments is relevant to either the Officer
15 Defendants' duty of care or whether they met it, it is relevant to the case. However,
16 if it is not relevant to either issue, it cannot be inserted into the case by the assertion
17 of affirmative defenses that are legally insufficient.

18
19 ² While the Officer Defendants argue that "[o]ther cases cited by the NCUA
20 similarly rest on the principle that the NCUA had no duty to WesCorp" and cite four
21 of the cases cited by the NCUA, *see* Docket 203 at 13:10-18, they do not address or
22 attempt to distinguish two other cases cited by the NCUA that made no reference to
23 the issue whether the regulator owed a pre-failure duty to a financial institution. *See*
24 *Sands*, 863 F. Supp. at 372-73 (holding that affirmative defenses cannot be based on
25 the pre-failure conduct of regulators, without holding or suggesting that such
26 defenses are unavailable based simply upon a lack of duty); *Carter*, 701 F. Supp. at
27 737 (holding that the FTCA's discretionary function exemption "protects the FDIC
28 from any liability for negligence in examining a bank" prior to its failure).
Furthermore, three of the cases cited by the Officer Defendants recognize that the
rule barring the assertion of affirmative defenses against regulators of financial
institutions based on the regulators' pre-failure conduct is based upon the FTCA's
discretionary function exemption, not only the lack of a duty owed by regulators.
See Grant Thornton, 535 F. Supp. 2d at 721; *Lowe*, 809 F. Supp. at 858-59; *Ashley*,
749 F. Supp. at 1068. Thus, there is no basis for the Officer Defendants' attempt to
distinguish the cases barring the assertion of affirmative defenses against regulators
as being based upon the regulator's lack of duty.

1 In short, alleging that the NCUA encouraged, approved, or praised
2 WesCorp's management does not change the fundamental rule that the NCUA's
3 pre-failure conduct cannot, as a matter of law, support the Officer Defendants'
4 affirmative defenses that the NCUA is seeking to strike here.

5 **II. THE COURT SHOULD STRIKE THE AFFIRMATIVE DEFENSES**
6 **RELYING ON THE BUSINESS JUDGMENT RULE BECAUSE THAT**
7 **RULE DOES NOT APPLY TO OFFICERS.**

8 Although the Court already held that the business judgment rule does not
9 apply to the Officer Defendants, *see* Docket 110 at 9-11, they argue, *see* Docket 203
10 at 15:12-23, that the Court should revisit the issue based on Judge Fischer's
11 September 27, 2011 ruling in *FDIC v. Van Dellen*, Case No. CV 10-4915 DSF
12 (SHx) (C.D. Cal. Sept. 27, 2011). But *Van Dellen* does not compel a different
13 outcome.

14 In *Van Dellen*, former officers of IndyMac asserted the business judgment
15 rule as an affirmative defense to the FDIC's claims against them for negligence and
16 breach of fiduciary duty. The *Van Dellen* court denied the FDIC's motion for
17 judgment on the pleadings as to those affirmative defenses for two reasons. First,
18 the court held that the "Delaware business judgment rule may apply" and that
19 Delaware law, unlike California law, permits officers to rely upon the business
20 judgment rule. *Id.* at 3. Second, the court reasoned that even if California law
21 applied, the FDIC had not shown that the California business judgment rule is
22 inapplicable as a matter of law:

23 California has recognized that "[t]he common law business judgment
24 rule has two components: and "[o]nly the first component is embodied
25 in Corporations Code section 309." *Lee v. Interinsurance Exch.*, 50
26 Cal. App. 4th 694, 714 (1996); *see also Barnes v. State Farm Mut.*
27 *Auto. Ins. Co.*, 16 Cal. App. 4th 365, 378-79 (1993).

28 *Id.* at 3; *but see Gaillard v. Natomas Co.*, 208 Cal. App. 3d 1250, 1265 (1989)
(officers are not entitled to invoke the business judgment rule).

1 Thus, the *Van Dellen* court failed to analyze the ***second*** common law
2 component of the business judgment rule. This Court considered that component
3 and concluded that it insulates only directors, not officers:

4 Even if the argument would be that sections 309 and 7231 codify only
5 one “component” of the common law business judgment rule, *see Lee*,
6 50 Cal. App. 4th at 714, that second component – apparently still left to
7 the common law – has been described as one “which insulates from
8 court intervention those management decisions which are made by
9 *directors* in good faith in what *the directors* believe is the
organization’s best interest.” *Id.* (emphasis added); *see also Barnes v.*
State Farm Mut. Auto. Ins. Co., 16 Cal. App. 4th 365, 378 (describing
“a judicial policy of deference to the business judgment of *corporate*
directors in the exercise of their broad discretion in making corporate
decisions”) (quoting *Gaillard*) (emphasis added).

10 Docket 110 at 10.

11 Judge Wright recently reached the same conclusion in *Perry*, 2011 U.S. Dist.
12 LEXIS 143222 at *8-14. In that case, a former IndyMac officer contended that the
13 business judgment rule insulated him from personal liability on the FDIC’s claims.
14 After analyzing California’s common law and statutory business judgment rule, the
15 court unequivocally held that “California’s statutory [business judgment rule] does
16 not extend its protection to corporate officers.” *Id.* at *11. The court also observed
17 that the legislative history for Section 309 “show[ed] that it was the drafters’ intent
18 not to include officers when applying [the business judgment rule’s] standard of care
19 to directors.” *Id.* at *12. In fact, the court noted that “when the California
20 legislature had the opportunity to codify common law [business judgment rule], it
21 purposely excluded its application to corporate officers.” *Id.* at *13.

22 In sum, as this Court has already held, and as Judge Wright recently
23 confirmed in *Perry*, the Officer Defendants cannot rely upon the business judgment
24 rule. The court should thus strike the Officer Defendants’ affirmative defenses
25 based on the business judgment rule.

1 **III. THE STATUTE OF LIMITATIONS DEFENSES ARE LEGALLY**
2 **INSUFFICIENT.**

3 Although the Officer Defendants do not dispute that their statute of
4 limitations defenses are nothing more than bare-bones legal conclusions, they argue
5 that they are nonetheless sufficient as pled because the “highly ambiguous
6 allegations in the NCUA’s Second Amended Complaint” make it difficult to
7 determine the applicable statute of limitations. Docket 203 at 16:4 – 17:16.

8 The NCUA does not bear the burden of establishing the applicable statute of
9 limitations. As with all affirmative defenses, the party asserting the defense must
10 provide “fair notice” of the nature of the defense by alleging facts that explain how
11 the defense relates to the instant case. *See Wyshak v. City Nat’l Bank*, 607 F.2d 824,
12 827 (9th Cir. 1979). Thus, merely stating that claims are barred “by the applicable
13 statute(s) of limitations” – as the Officer Defendants do – is not enough. Instead,
14 the Officer Defendants must show “why that affirmative defense might exist.”
15 *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d
16 1167, 1172 (N.D. Cal. 2010) (striking statute of limitations defense); *see Desert*
17 *European Motorcars, Ltd.*, 2011 U.S. Dist. LEXIS 96154 at *7-8 (striking statute of
18 limitations defense where defendant failed to plead facts supporting the defense);
19 *Gessele*, 2011 U.S. Dist. LEXIS 99419 at *15 (striking statute of limitations defense
20 because it failed to “identify which claims are untimely and which statutes of
21 limitations are at issue”); *J&J Sports Prods., Inc. v. Montanez*, 2010 U.S. Dist.
22 LEXIS 137732 (E.D. Cal. Dec. 13, 2010) (striking statute of limitations defense
23 because defendants failed to plead any facts or legal theory to support the
24 affirmative defense).

25 Because the Officer Defendants’ statute of limitations defenses do not attempt
26 to articulate any applicable statute of limitations, much less plead any facts
27 supporting the defenses, the Court should strike those defenses. If the Officer
28 Defendants wish to amend these affirmative defenses, they should identify each of

1 the statute(s) of limitations that they believe might apply, specify which claims are
2 supposedly barred by the statute(s) of limitations, and allege facts that support their
3 contention that such claims are time barred in part or in full.

4 **IV. SIDLEY’S ESTOPPEL DEFENSE IS LEGALLY INSUFFICIENT.**

5 Sidley’s affirmative defense of estoppel fails for several reasons. First, the
6 defense is based on the NCUA’s pre-failure regulatory conduct, which, for the
7 reasons discussed above, is a legally insufficient ground for an affirmative defense.
8 *See, e.g., Grant Thornton*, 535 F. Supp. 2d at 722 (“claims or defenses based upon
9 pre-receivership actions of regulators are legally insufficient”).

10 In addition, in order to plead the defense of estoppel against the government,
11 a defendant must allege facts showing that the “government’s wrongful act would
12 cause serious injustice and . . . the public interest would not be unduly harmed by
13 imposition of the doctrine.” *Mukherjee v. Immigration & Naturalization Serv.*, 793
14 F.2d 1006, 1009 (9th Cir. 1986); *see Bottoni v. Sallie Mae, Inc.*, 2011 U.S. Dist.
15 LEXIS 93634 at *5 (N.D. Cal. Aug. 22, 2011) (striking defense of estoppel);
16 *Qarbon.com Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1049-40 (N.D. Cal. 2004)
17 (striking affirmative defense of estoppel where defendant failed to provide sufficient
18 factual basis for the defense); *SEC v. Sands*, 902 F. Supp. 1149, 1166 (C.D. Cal.
19 1995) (striking defense of estoppel).

20 Sidley’s affirmative defense of estoppel does not come close to satisfying this
21 heightened standard. *See* Docket 191, ¶¶ 277-78. Apparently recognizing this
22 deficiency, Sidley argues that “[w]hile there is an additional requirement that applies
23 when equitable estoppel is asserted against the government, that requirement does
24 not apply because the NCUA is subject to all defenses WesCorp is subject to,
25 including equitable estoppel.” Docket 203 at 18 n.3. However, Sidley’s estoppel
26 affirmative defense alleges that the *NCUA* is equitably estopped by its alleged
27
28

1 actions and failures to act.³ See Docket 191, ¶ 278. WesCorp would not have been
2 subject to an affirmative defense of estoppel based upon the NCUA's action or
3 inaction, and Sidley therefore cannot show that he is entitled to assert his affirmative
4 defense of estoppel against the NCUA because he could have asserted it against
5 WesCorp.

6 CONCLUSION

7 For the reasons set forth herein and in the NCUA's opening brief, the Court
8 should strike in their entirety: (a) Siravo and Swedberg's First, Third, and Fifth
9 Affirmative Defenses; (b) Burrell's Second and Seventh Affirmative Defenses;
10 (c) Lane's First, Second and Fifth Affirmative Defenses; and (d) Sidley's Second,
11 Eleventh, and Twelfth Affirmative Defenses. The Court should also strike the
12 references to the NCUA in: (a) Siravo and Swedberg's Sixth and Seventh
13 Affirmative Defenses; (b) Burrell's First Affirmative Defense; (c) Lane's Sixth and
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20 ³ In describing the factual basis for his affirmative defense of estoppel, Sidley
21 cites certain factual allegations concerning WesCorp that are incorporated by
22 reference into his Eleventh Affirmative Defense of estoppel by reason of his
23 incorporation by reference of all allegations stated in his First Affirmative Defense.
24 See Docket 203 at 18:3 – 19:2. However, Sidley's estoppel defense itself is based
25 on the alleged action and inaction of the NCUA, not of WesCorp:

26 The Second Amended Complaint, and each cause of action
27 alleged therein against Sidley, is barred, in whole or in part, by the
28 doctrine of estoppel because WesCorp complied with the NCUA's
regulations and directors and/because [sic] WesCorp's investments
were reviewed and approved by the NCUA and its examiners and
therefore, ***by its words, actions and failures to act, NCUA is equitably
estopped*** from asserting each of the purported causes of action alleged
in the Complaint and/or from obtaining any of the relief sought thereby.

Docket 191, ¶ 278 (emphasis added).

1 Seventh Affirmative Defenses; and (d) Sidley's First and Sixth Affirmative
2 Defenses.

3 DATED: December 23, 2011 LUCE, FORWARD, HAMILTON & SCRIPPS LLP
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